No. 95-1340

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

HUGHES AIRCRAFT COMPANY,

*Petitioner,*

v.

UNITED STATES EX REL. WILLIAM J. SCHUMER,

*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY TO BRIEF IN OPPOSITION

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## TABLE OF AUTHORITIES

**Other:**



Respondent Schumer struggles mightily to explain away the various circuit splits identified in Hughes' petition, but those efforts are ultimately in vain. As Schumer concedes, at the very least the decision below squarely conflicts with the Second Circuit's decision in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992). That concession comes as no surprise, as the court below could hardly have been more explicit in rejecting the Second Circuit's interpretation of the False Claims Act ("FCA"). *See* App. at 11a ("[W]e reject the *Doe* court's definition of 'public disclosure,' which forecloses many insiders from bringing *qui tam* actions."); *id.* at 9a ("We decline to adopt the rule of *Doe* for application in this circuit."). Had this case been brought in the Second Circuit, in other words, it would have been dismissed for lack of jurisdiction; because it was brought in the Ninth, it lives on.

Nonetheless, Schumer insists that neither the "public disclosure" issue nor any of the other issues raised in the petition warrant review. He is wrong.

## I. THE JURISDICTIONAL ISSUES

### A. The Retroactivity Issue

Schumer does not deny that, but for the 1986 FCA amendments, this action would have been barred outright. Nonetheless, he doggedly defends the Ninth Circuit's remarkable conclusion that those amendments did not "impair any rights [Hughes] had when it acted, nor . . . increase [Hughes'] liability for past conduct, or impose new duties." Opp. at 4 n.2 (quoting *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1408 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1319 (1996)). It is, to put it mildly, not obvious how the elimination of an absolute defense does not "impair" a *qui tam* defendant's substantive rights.

That is precisely why the Sixth Circuit refused to apply the 1986 FCA amendments retroactively in *United States v. TRW, Inc.*, 4 F.3d 417 (6th Cir. 1993), *cert. denied*, 114 S. Ct. 1370 (1994). Schumer, however, asserts that the conflict between

the decision below and *TRW* is "illusory," Opp. at 2, because *TRW* was decided before this Court's decision in *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1499 (1994). According to Schumer, *Landgraf* marked a "'significant shift'" in the law of retroactivity, Opp. at 4 (quoting *Lindenthal*, 61 F.3d at 1407), that the *TRW* court simply "failed to anticipate," Opp. at 5.

The conflict is real. Schumer's revisionist analysis conveniently overlooks the point that *Landgraf* reaffirmed traditional retroactivity principles, including the principle permitting retroactive application of provisions that are purely procedural and do not impair substantive rights. *See* 114 S. Ct. at 1501-02. The *TRW* court simply applied these settled principles in refusing to apply the 1986 FCA amendments retroactively, noting that they "expand the circumstances under which citizens may bring false claims suits." 4 F.3d at 422. Nothing in *Landgraf* undermines that conclusion, as underscored by this Court's denial of *certiorari* in *TRW* less than one month before announcing *Landgraf*. *See* Pet. at 10 n.2.[1]

**B. The "Public Disclosure" Issue**

In its petition, Hughes presented two distinct grounds why Schumer's *qui tam* action should be dismissed even under the terms of the FCA as amended in 1986: *first*, the Government's disclosure of the alleged accounting irregularities to Hughes' and Northrop's "innocent employees" constituted "public disclosure" as a matter of law, *see* Pet. at 11-15, and *second*,

[1] Schumer also dismisses the retroactivity issue as "purely academic," Opp. at 5, on the theory that present and future cases are likely to involve conduct occurring *after* the 1986 amendments. By definition, of course, the number of cases involving retroactive application of a new law will dwindle over time. Schumer, however, does not deny the existence of pending cases raising the FCA retroactivity issue, *see* Brief of *Amici Curiae* Chamber of Commerce *et al.* at 6-7, or the need for further guidance in this jurisprudentially chaotic area.



the availability of information regarding those alleged irregularities to the public under the Freedom of Information Act ("FOIA") also constituted "public disclosure" as a matter of law, *see id.* at 16-18.

**1. Disclosure to "innocent employees"**

Because he cannot plausibly deny the acknowledged split between the Second and Ninth Circuits on the "innocent employee" issue, Schumer attempts to downplay the issue's significance. While his eagerness to avoid this Court's review may be understandable, his arguments in favor of allowing the split to fester are not.

Inexplicably characterizing the interpretation of the term "public disclosure" in the FCA as "a highly technical issue of statutory construction," Opp. at 9, Schumer insists that the circuit split is too trivial to warrant this Court's consideration, *see id.* at 1, 7-9.[2] The "innocent employee" issue arises, he asserts, only in an "exceedingly narrow class of cases." *Id.* at 8. That assertion cannot withstand even casual scrutiny.

As Hughes observed in its petition, the practical implications of the decision below are staggering: whenever a government audit or investigation suggests any irregularity, a contractor's "innocent employees" will be free to file lucrative *qui tam* suits based on information obtained from the Government.[3] The Ninth Circuit acknowledged this potential for abuse, but

[2] Schumer also resorts to the less-than-subtle tactic of reordering Hughes' two distinct "public disclosure" arguments and then describing the "innocent employee" argument as a "sub-issue" of the FOIA argument. Opp. at 7. Indeed, not content merely to reorder the arguments, Schumer brazenly asserts that *Hughes itself* adopted that order. *Compare* Opp. at 5 (asserting that Hughes "first" raised the FOIA, and then the "innocent employee," argument) *with* Pet. at 11-18.

[3] The decision's implications are particularly dramatic in light of the Ninth Circuit's further holding that *no showing of injury to the public fisc* is necessary to establish a cause of action under the FCA. *See* App. at 25a.

breezily observed that contractors will face only "a single lawsuit in each instance, since the first filing would constitute public disclosure sufficient to bar other claims based upon the audit." App. at 11a. By thus allowing "innocent employees" to file avowedly parasitic lawsuits, the Ninth Circuit has established itself as a magnet for *qui tam* relators.

Indeed, Schumer's assertion that the decision below is insignificant is perhaps most obviously belied by the two briefs *amici curiae* filed on Hughes' behalf by potential FCA *qui tam* defendants. Those *amici*, unlike Schumer, do not have the luxury of rosily discounting the enormous practical implications of this case. They are well aware of the oncoming deluge of *qui tam* litigation if the decision below is allowed to stand.

Finally, Schumer asserts that review of the Ninth Circuit's interpretation of "public disclosure" is unwarranted because the issue is "not necessarily determinative even here." Opp. at 1. In support of that remarkable assertion, Schumer speculates that the Ninth Circuit might instead have reached the same result on the ground that (i) the action is not "based upon" any such disclosure, or (ii) Schumer is an "original source" of the allegations of misconduct. *See* Opp. at 9.

Such speculation is preposterous. Schumer cannot, and does not, contend that the court below rested its holding on alternative grounds. To the contrary, he concedes that the Ninth Circuit *expressly declined to reach* either the "based upon" or "original source" issues in light of its conclusion that no "public disclosure" had occurred as a matter of law. *See* Opp. at 9, App. at 14a. A prevailing party cannot insulate a decision from review by simply asserting that he might have prevailed on other grounds instead.

**2. Disclosure through FOIA**

Schumer abandons any pretense of arguing that "public disclosure" can take place when documents are made *available* to the public; rather, he insists that "public disclosure" cannot



take place until a member of the public *actually obtains* the documents. *See* Opp. at 5-7. Schumer's candid disavowal of the availability theory is at least a refreshing contrast to the Ninth Circuit's obfuscatory approach: while purporting to accept the premise that documents are "publicly disclosed" when made *available* to the public, the court below simply asserted a distinction between "actual" and "potential" availability, and held that a document is not "publicly disclosed" until it is "actually available"—*i.e.*, until it is *actually obtained* by a member of the public. App. at 13a.

Schumer's brief, accordingly, underscores rather than reconciles the circuit split identified in the petition. Both the Second and Third Circuits have recognized that "public disclosure" occurs whenever a document is available to the public, *regardless* of whether a member of the public actually obtains it. *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1159 (3d Cir. 1991); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir.), *cert. denied*, 508 U.S. 973 (1993). Application of the availability theory adopted in those cases would readily lead to the dismissal here: Schumer does not deny that the relevant documents here were available to him under FOIA at the time he filed his suit. (Indeed, he could scarcely deny the point, as he *himself* actually obtained the documents under FOIA after filing this suit.)

Schumer, however, attempts to deny the circuit split by essentially writing the availability theory off the books. Thus, he insists that *Stinson* and *Kreindler* did not involve availability at all, but rather "actual disclosure." *See* Opp. at 6-7; *but see* Opp. at 7 n.4. Even the Ninth Circuit, however, was candid enough to acknowledge that its rejection of "potential" availability conflicted with *Stinson*, and rejected that case insofar as it held that a "public disclosure" of information could take place before a member of the public actually obtained that information. *See* App. at 12a ("[W]e reject the

rationale of *Stinson* to the extent that it comes to an opposite conclusion.").

## II. THE "PUBLIC FISC" ISSUES

### A. The *De Facto* Amendment Issue

Perhaps the most far-fetched assertion in Schumer's brief is that this Court is precluded from considering Hughes' challenge to the Ninth Circuit's rule of *de facto* amendment because that issue is not specifically set forth as an independent ground for review in the "Questions Presented" in the petition. *See* Opp. at 10 n.7. While acknowledging that Hughes "dedicate[d] two pages of its petition" to presenting this issue, *id.*, Schumer insists that "the issue is not properly before the Court," *id.*

It is well-established, however, that a petitioner need not set forth a separate question with respect to each and every theory on which it seeks review. To the contrary, this Court's Rule 14.1(a) specifies that the questions presented must be "short" and "concis[e]," and that "[t]he statement of any question presented is *deemed to comprise every subsidiary question fairly included therein.*" S. Ct. Rule 14.1(a) (emphasis added).

To minimize the number and complexity of the questions presented, Hughes decided not to break the *de facto* amendment issue into a separate question, but to treat it as a subsidiary aspect of the "public fisc" issue. As the petition explains: *"Before addressing th[e] [public fisc] holding . . . it is first necessary to address the Ninth Circuit's preliminary procedural ruling"* on *de facto* amendment. Pet. at 18 (emphasis added). Hughes' determination that the *de facto* amendment issue is subsumed within the "public fisc" issue has abundant support in this Court's precedents. *See, e.g.*, *Missouri v. Jenkins*, 115 S. Ct. 2038, 2047 (1995); *Lebron v.*



*National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995); *cf. Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990).[4]

Turning to the merits of the *de facto* amendment issue, Schumer attempts to pass off the holding below as "consistent with hornbook law and the law of other circuits." Opp. at 10 n.7. Not so. The Ninth Circuit did not hold that the district court had *discretion* to treat the new allegations in Schumer's opposition to summary judgment as a *de facto* amendment of his complaint, but that the court was *required* to do so. *See* App. at 22a-23a. The "hornbook law" cited by Schumer, *see* Opp. at 10 n.7 (quoting 6 J. Moore, *Moore's Federal Practice* ¶ 56.10 (2d ed. 1988)), in no way supports that illogical and rigid approach.

Schumer's further attempt to deny the circuit split on this point is even more of a stretch. Schumer asserts that the Seventh Circuit "subsequently repudiated" one of the cases cited by Hughes, *Pritchard v. Rainfair, Inc.*, 945 F.2d 185, 191 (7th Cir. 1991). *See* Opp. at 10 n.7 (citing *Teumer v. General Motors Corp.*, 34 F.3d 542, [545] (7th Cir. 1994)). But *Teumer* merely held that a plaintiff is not invariably bound by the specific *legal* theories set forth in a complaint, but may subsequently invoke new and different legal theories to support the *facts* alleged therein. *See* 34 F.3d at 545 (limiting *Pritchard* only to the extent the latter might be read to "sugges[t]" that "a complaint that does not contain the appropriate *legal theory* to match the facts alleged is deficient") (emphasis added). *Teumer*, accordingly, provides

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[4] Indeed, it would be ludicrous to hold at the *certiorari* stage that a petitioner could, through the phrasing of the questions presented, "waive" an issue explicitly presented for review in the body of the petition. Even if the Court were to conclude that the "public fisc" issue as framed in Hughes' petition did not fairly embrace the *de facto* amendment issue, the remedy at this stage would not be to deem the latter issue waived, but to rewrite one or more of the questions presented. *See, e.g., Ankenbrandt v. Richards*, 502 U.S. 1023 (1992); *Hudson v. McMillian*, 500 U.S. 903 (1991).

no support for the Ninth Circuit's rule that a district court has *no discretion* to prevent a plaintiff from resisting summary judgment on the basis of entirely new *factual* allegations not pleaded in the complaint. Indeed, established law in the Seventh Circuit and elsewhere is clearly to the contrary. *See* Pet. at 19; *see also Samuels v. Wilder*, 871 F.2d 1346, 1350-51 (7th Cir. 1989); *NL Indus., Inc. v. GHR Energy Corp.*, 940 F.2d 957 (5th Cir. 1991), *cert. denied*, 502 U.S. 1032 (1992).

**B. The "Public Fisc" Issue**

On the merits of the "public fisc" issue, Schumer conspicuously attempts to distance himself from the decision below. The Ninth Circuit could scarcely have been clearer in holding that Schumer's allegation that Hughes violated the Government's Cost Accounting Standards ("CAS") "creates a genuine issue of material fact relating to a violation of the False Claims Act" *regardless* of any resulting injury to the public fisc. App. at 25a-26a. "[T]he lack of a determination of actual harm from the CAS violation does not preclude a claim under the FCA." *Id.* at 25a.

Schumer, however, dismisses that analysis—on which the Ninth Circuit expressly based its holding—as "dictum" that "in no way suggests that the court below intended (or could have intended) to dispense with the 'injury' requirement." Opp. at 12. If, as Schumer contends, the Ninth Circuit did indeed recognize an "injury" requirement under the FCA, it could scarcely have expressed itself more inartfully. In any event, Schumer insists that the element of injury is "plainly present here," Opp. at 11, in the form of the costs presumably incurred in the government investigation that ultimately concluded that Hughes' challenged accounting practices had actually *saved* the Government money. Notwithstanding the Government's conclusion, Schumer improbably contends that the investigation costs *alone* as a matter of law satisfy the statutory



requirement of injury to the public fisc that he (unlike the Ninth Circuit) recognizes.[5]

As a practical matter, Schumer's expansive theory of "injury" would eliminate the injury requirement altogether. Schumer's suggestion that this Court ratified his creative theory in *United States v. Halper*, 490 U.S. 435 (1989), is far-fetched at best. The question in *Halper* was whether a particular civil fine under the FCA should be deemed "punitive" so as to preclude any subsequent criminal prosecution. In rejecting that double-jeopardy claim, the *Halper* Court analogized an FCA fine to a liquidated damages provision that served in part to compensate the Government for its losses (including its investigative and prosecutorial costs) resulting from a party's fraud. *Id.* at 445-46 & n.6. The *Halper* Court in no way held that such attenuated "injuries" were enough, *in and of themselves*, to provide the basis for an FCA *qui tam* action.[6]

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[5] While reiterating in passing the Ninth Circuit's assertion that the alleged CAS violations "may" have resulted in "unallowable" costs, Opp. at 12, Schumer conspicuously fails to respond to Hughes' explanation that any such conclusion is foreclosed by the Government's determination that Hughes' accounting methods complied with applicable regulations. *See* Pet. at 20-21 n.7.

[6] Schumer also insinuates that this Court's review of the "public fisc" issue would be inappropriate because Hughes did not raise that issue below. *See* Opp. at 11 n.8. But Hughes had no reason to do so, because the issue did not arise until the Ninth Circuit's remarkable decision to affirm the award of summary judgment in Hughes' favor on all claims *except* those alleging wholly technical violations of government accounting procedures. Because the decision below expressly addressed the "public fisc" issue, that issue is unquestionably before this Court. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995).

## III. THE CONSTITUTIONAL ISSUES

Finally, Schumer seeks to avoid review of the underlying constitutionality of the FCA's *qui tam* provisions on the ground that the constitutional issues are well-settled. Indeed, he chides Hughes for even daring to suggest to the contrary: "Hughes' assertion that the constitutional issues 'remain[] unsettled' is . . . made up out of whole cloth." Opp. at 14-15 (citation omitted). Schumer's aggressive contention that it is too late in the day even to question the constitutionality of private *qui tam* actions is perhaps the best evidence of the need to do just that.

Schumer bases his contention on four court-of-appeals decisions issued in the past four years and a snippet of *dicta* from an opinion rendered by this Court more than a half-century ago.[7] Needless to say, those authorities are hardly conclusive. The constitutional questions at stake are simply too important to be deemed "settled" by default. The Constitution gives the final word on such questions to *this* Court, and to this Court alone.

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[7] Schumer also emphasizes this Court's denial of *certiorari* in *Boeing Co. v. United States ex rel. Kelly*, 114 S. Ct. 1125 (1994), apparently hoping to suggest that the Court thereby implicitly ratified the constitutionality of the FCA's *qui tam* provisions. *See* Opp. at 14. Any such suggestion, of course, is wholly unwarranted. *See, e.g., Missouri v. Jenkins*, 115 S. Ct. 2038, 2047 (1995).

Respectfully submitted,

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